Firstline Transportation Security, Inc. *and* International Union, Security, Police and Fire Professions of America (SPFPA). Case 17–RC–12354

June 28, 2006

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

In this case, the Board must decide whether to assert jurisdiction over Firstline Transportation Security, Inc. (the Employer), an Ohio-based private company that provides passenger and baggage screening services at the Kansas City International Airport, in Kansas City, Missouri, pursuant to a contract with the Transportation Security Administration (TSA). The issue concerns the intersection of two statutes: the National Labor Relations Act[1] (the Act), and the Aviation and Transportation Security Act (ATSA).[2] The stated purposes of the Act are to encourage the practice and procedure of collective bargaining and protect employee freedom of choice in deciding whether they wish to be represented for the purposes of collective bargaining and by whom. The stated purpose of the ATSA is to improve aviation security.

On May 27, 2005, the Regional Director for Region 17 issued a Decision and Direction of Election in which he determined that the Employer is subject to the Board's jurisdiction. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review. While the Employer stipulated that it meets both the definitional and monetary jurisdictional requirements under the Board's decision in *Management Training Corp.*,[3] it contended that the Regional Director erred in asserting jurisdiction over it because the Board is statutorily barred from doing so by the TSA's Under Secretary James Loy's determination that Federally-employed screeners are not entitled to engage in collective bargaining. Alternatively, the Employer argued that the Board should decline to assert jurisdiction in the interest of national security.

The election was conducted as scheduled on June 23, 2005, and the ballots were impounded pending the Board's decision. By Order dated June 30, 2005, the Board granted the Employer's request for review.[4] On July 7, 2005, the Board issued a Notice and Invitation to File Briefs. On July 8, 2005, the Board's acting solicitor wrote to the TSA's chief counsel to solicit the TSA's views on the case.

The Employer and the Petitioner filed briefs on review. Eight amici curiae also filed briefs.[5] The Employer and Petitioner subsequently filed responses to the amici curiae briefs. The TSA submitted a statement and a clarification to its statement.

Having carefully considered the entire record in this proceeding, including the briefs on review, the amici curiae briefs, the response briefs, and the statement and clarification of the TSA, we conclude that we should assert jurisdiction over the Employer. We find that the Board is not statutorily barred from asserting jurisdiction over the Employer by Under Secretary Loy's determination that Federally-employed screeners are not entitled to engage in collective bargaining. Further, in accordance with a long line of Board precedent, we do not believe that the Board should, in this case, decline to assert jurisdiction in the interest of national security. Consequently, we affirm the Regional Director's decision for the reasons set forth below.

I.

A. Relevant Statutory Provisions

In response to the terrorist attack on September 11, 2001, Congress passed the ATSA, making airport security a direct Federal responsibility and creating the TSA as an entity within the Department of Transportation. See 49 U.S.C. §114. Congress provided that the head of the TSA, the Under Secretary of Transportation for Security, would be responsible for the security screening of all passengers and property carried aboard passenger aircraft, and for the hiring, training, and employment standards of security screening personnel. The ATSA also provided that Federal Government employees would perform the actual work of screening passengers and property. ATSA Section 44901(a) states:

> (a) In general.—The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail,

[1] 29 U.S.C. §§ 151-169.

[2] Pub. L. No. 107-71, 115 Stat. 635 (2001) (codified as amended in scattered secs. of 5, 26, 31 & 49 U.S.C.).

[3] 317 NLRB 1355 (1995).

[4] *See Firstline Transportation Security*, 344 NLRB No. 124 (2005) (with Member Liebman dissenting).

[5] Amici curiae briefs were filed by the following: American Federation of Government Employees; Service Employees International Union; American Federation of Labor-Congress of Industrial Organizations; International Longshore and Warehouse Union; The Honorable John L. Mica, U.S. House of Representatives; The Honorable Dick Armey, Former Majority Leader, U.S. House of Representatives; National Right to Work Legal Defense Foundation; and Akal Security.

> cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation. In the case of flights and flight segments originating in the United States, the screening shall take place before boarding and shall be carried out by a Federal Government employee (as defined in section 2105 of title 5, United States Code), except as otherwise provided in section 44919 or 44920 and except for identifying passengers and baggage for screening under the CAPPS and known shipper programs and conducting positive bag-match programs.[6]

Congress also provided that the Under Secretary could contract with a "qualified private screening company" to perform screening functions pursuant to two different sections of the ATSA. First, Section 44919, authorized the TSA to establish a 2-year pilot program known as the "PP5 Pilot Program," at five airports. Second, Section 44920 provided that, 3 years following the enactment of the ATSA, the TSA could establish an "opt-out" program allowing any airport nationwide to contract with a private screening company.

Section 44935 sets forth employment and training standards for security screeners employed by the Federal Government, and gives the head of the TSA the authority to establish programs for the hiring and training of such personnel. The ATSA applies these standards to private contractors hired under the pilot and "opt-out" programs. Included at Section 44935(i) is a prohibition of the right to strike by all individuals employed in screening positions. This provision states:

> (i) Limitation on right to strike.—An individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening.[7]

Further, the annotation to Section 44935 (also referred to as the "Note") states the following:

> Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of Title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.[8]

In November 2002, Congress passed the Homeland Security Act, 6 U.S.C. § 111, creating the Department of Homeland Security as an executive department and transferring the TSA from the Department of Transportation to the Department of Homeland Security. On January 8, 2003, Admiral James Loy, the TSA's Under Secretary, issued a memorandum denying collective-bargaining rights and the right to representation to security screeners employed by the TSA.[9] In its entirety, the Memorandum states:

> By virtue of the authority vested in the Under Secretary of Transportation for Security in Section 111(d) of the Aviation and Transportation Security Act, Pub. Law No. 107-71, 49 U.S.C. § 44935 Note 2001, I hereby determine that individuals carrying out the security screening function under section 44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization.

On November 4, 2003, the Federal Labor Relations Authority (FLRA) upheld Under Secretary Loy's determination that Federal security screeners have no collective-bargaining or representational rights. *U.S. Department of Homeland Security, Border & Transportation Security Directorate, Transportation Security Administration*, 59 FLRA 423 (2003).[10]

[6] 49 U.S.C. § 44901(a).
[7] 49 U.S.C. § 44935(i).
[8] 49 U.S.C. § 44935 Note.
[9] Title 5 of the U.S. Code generally requires Federal agencies to bargain with employee organizations, subject to any limitations "specifically provided for by Federal Statute." Certain agencies, such as the Federal Bureau of Investigation and the Central Intelligence Agency, are expressly exempt from Agency coverage under Title 5, in part because of their distinct roles in national security. The TSA and the Department of Homeland Security are not exempt by statute.
[10] In making its finding that the ATSA language precluded the assertion of jurisdiction, the FLRA relied exclusively on the language of the annotation to Sec. 44935 to conclude that collective bargaining and union representation were inappropriate, because the Under Secretary had unfettered discretion in making all decisions about the "terms and conditions of employment of Federal service" of security screeners. The FLRA further reasoned that "notwithstanding any other provision of law," language contained in the same annotation "trumped" any other provision of the ATSA that might purport to give TSA employees collective-bargaining rights. The FLRA concluded that the other provisions of the ATSA that allowed TSA employees the same rights as other Federal employees, including the right to collectively bargain, applied only to nonsecurity-screener positions at the TSA, but because of the more specific language of Sec. 44935's annotation, security

B. Facts

Kansas City International Airport is one of the five airports chosen by the TSA to contract with private companies to perform passenger and baggage screening operations pursuant to the PP5 pilot program.[11] In 2004, both the United Steelworkers of America and the International Association of Machinists and Aerospace Workers petitioned to represent the Employer's screening employees at the airport. The Employer did not contest the Board's assertion of jurisdiction at that time but did argue that its employees were guards and therefore could not be represented by the Steelworkers or Machinists consistent with Section 9(b)(3) of the Act. The Regional Director agreed with the Employer and dismissed the petitions. The Board subsequently denied the Machinists' request for review of the Regional Director's decision.[12]

In 2005, the Petitioner, International Union, Security, Police and Fire Professionals of America, filed the instant petition seeking to represent the Employer's screeners and lead screeners performing guard duties. The Petitioner is a guards-only union. The Employer challenged the petition. At a hearing, the Employer acknowledged that it meets the Board's statutory and discretionary jurisdictional standards; nevertheless, it contended that it was not subject to the Board's jurisdiction. The Employer's argument was twofold. First, it asserted that the Board is statutorily barred from asserting jurisdiction by Under Secretary Loy's determination that Federally-employed screeners are not entitled to engage in collective bargaining. Second, the Employer argued that even if the ATSA's provisions do not specifically preclude the Board from asserting jurisdiction, the Board should decline to assert jurisdiction in the interest of national security.

II.

A. The TSA's Interpretation of the ATSA

We begin with the familiar canon of statutory construction that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). It is undisputed that the ATSA is silent when it comes to the collective-bargaining rights of any group of employees. The statute does not provide for collective-bargaining rights for any employees, private or Federal, and similarly it does not specifically prohibit collective bargaining.

Rather, it is the Under Secretary's Memorandum (Memorandum) that deals with collective-bargaining rights and prohibits screener employees from engaging in collective bargaining. The Employer and various amici curiae contend that the Memorandum applies to both private and Federally-employed screeners. The Petitioner and other amici curiae contend that it only applies to Federally-employed screeners. Nothing on the Memorandum's face answers the question.

In issuing the Memorandum, the Under Secretary relied exclusively on the authority vested in him by the annotation to Section 44935. Consequently, we must examine the annotation to Section 44935 to determine if it vests the Under Secretary with authority to "set the terms and conditions of employment" of screeners who work for private employers. Only if it does so can the Memorandum legitimately be read to apply to privately-employed screeners.

According to the TSA, the annotation to Section 44935 applies only to security screeners employed by the TSA and not to privately-employed security screeners and, therefore, does not prohibit privately-employed screeners from engaging in collective bargaining.

In the statement the TSA filed with the Board, the TSA wrote:

> Although aviation security screeners employed by TSA are statutorily barred from engaging in mandatory collective bargaining, see §111(d) of the Aviation Transportation and Security Act of 2001, P.L. 107-71, 115 Stat. 597, codified at 49 U.S.C. § 44935 Note, it is the TSA's position that this provision does not extend to aviation screeners employed by qualified screening companies. Therefore, § 111(d) does not prohibit privately-employed screeners from engaging in collective bargaining.

Given this interpretation, the Memorandum issued by the Under Secretary cannot apply to privately employed security screeners because of a lack of statutory underpinning. The Under Secretary only has the statutory authority to "fix the compensation" and the "terms and conditions of employment" of Federally-employed screeners and can consequently use that power to prohibit them from being represented for the purposes of collective bargaining. The annotation does not provide the Under Secretary the statutory authority to prohibit private screeners from being represented for the purposes of collective bargaining, even though those individuals

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screeners in the "Federal service" were not entitled to the collective-bargaining rights afforded other TSA employees.

[11] The other four airports are located in Tupelo, Mississippi; San Francisco, California; Rochester, New York; and Jackson Hole, Wyoming. The 2-year duration of the pilot program ended officially in November 2004, although the contractors are continuing to perform screening services under the "opt-out" program.

[12] See *Firstline Transportation Security*, Cases 17–RC–12297 and 17–RC–12298 (2004) (unpublished Order).

carry out the same security-screening function as Federally-employed screeners.

Further, after it filed its statement with the Board, the TSA filed a clarification. This clarification does not call into question the TSA's first statement interpreting the annotation to Section 44935. In the clarification, the TSA called the Board's attention to Section 108 of the ATSA. That section includes two provisions that relate to privately-employed security screeners: 49 U.S.C. § 44919(f), for pilot program airports, and 44920(c), for "opt-out" airports, both of which require that a private screening company "only employ individuals to provide such services who meet all the requirements of this chapter applicable to Federal Government personnel who perform screening services at airports." The "requirements" applicable to Federal Government personnel who perform screening services at airports are the enumerated employment and training requirements set out in Sections 44935(e) through (j). They concern things such as citizenship, education qualifications, English proficiency, test scores, background checks, and length of training. In creating the PP5 program and the "opt-out" program Congress wanted to make sure that all screeners were subject to the same standards and training requirements.

These requirements do not relate to labor relations or collective bargaining. As mentioned above, collective bargaining is not mentioned anywhere in the ATSA and therefore it cannot be a "requirement" of the ATSA applicable to Federal Government personnel who perform screening services. The decision to bar Federally-employed screeners from bargaining collectively was a policy decision made by the Under Secretary. While he was empowered to make the determination because of the authority vested in him by the ATSA, the ban is not a "requirement" of the ATSA.

TSA publications are consistent with the TSA's interpretation of the annotation to Section 44935. They reiterate that collective bargaining by privately-employed screeners is "a matter between those screeners and their employer." As noted by the Regional Director in his Decision and Direction of Election, the TSA's website page dealing with frequently-asked questions about the private contracting of security-screening functions contains the following answer, in response to the question of what the TSA's policy is regarding private screeners' rights to unionization:

> A: It is TSA policy to allow federal screeners to join any union but to not allow any union to represent all screeners for the purpose of collective bargaining. TSA does not take a position regarding whether screeners employed by private screening companies may organize their company. This is a matter between those screeners and their private employer. However, airport security screeners, private or federal, do not have the right to strike.

As the Regional Director also pointed out, in its June 2004 Guidance on Screening Program Partnership, page 8, under the headline of "Collective Bargaining," the TSA states in part: "Federal screeners are not entitled to engage in collective bargaining with TSA. TSA is neutral about contract employees of a private firm seeking to organize themselves for collective bargaining with that contractor."

The TSA was granted intervenor status in the case of *Covenant Aviation Security, LLC*, Case 20–RC–17896.[13] Covenant Aviation is a private firm providing airport security screening services at San Francisco International Airport. The TSA stipulated that it was not a joint employer with Covenant and it filed a posthearing brief reiterating that position. The TSA did not object to the Board's assertion of jurisdiction.

Since the TSA is the agency charged with administering the ATSA, we defer to the TSA's interpretation of that statute.[14] Indeed, its interpretation is our primary reason for rejecting the Employer's and amici curiae's argument that Admiral Loy's Memorandum applies to privately employed screeners.[15] The Board respects

[13] We take administrative notice of this case which was discussed in the brief filed by amicus curiae Service Employees International Union.

[14] We recognize that in the eyes of the courts an agency's expertise does not extend beyond its interpretations of its own enabling statute and, as a result, courts do not defer to an agency's interpretation of a statute whose administration is entrusted to another agency. See *Secretary of Labor, Mine Safety and Health Administration v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003); *Illinois National Guard v. FLRA*, 854 F.2d 1396, 1400 (D.C. Cir. 1988); *Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981). Therefore, a court would not defer to our interpretation of the annotation to Sec. 44935; it would only defer to the TSA's interpretation because the TSA is the agency entrusted to administer the ATSA.

[15] Prior to the TSA's submission of its interpretation of the annotation to Sec. 44935, the Employer contended that the fact that Secs. 44919 and 44920 are mentioned in Sec. 44901 means that the annotation to Section 44935, which references Sec. 44901, applies to private security-screener employees, as well as Federal Government screeners.

However, in light of the TSA's statements, the Employer abandoned this line of argument in its reply brief. In its reply brief, the Employer contends that while the annotation to Sec. 44935 gives the Under Secretary authority to issue his Memorandum, it is by no means the only provision of the ATSA that could do so. The Employer looks to Sec. 114 to provide the Under Secretary with authority to issue his Memorandum. Sec. 114 is the Section of the ATSA that creates the position of Under Secretary of Transportation for Security. Specifically, subsection (e) states that the Under Secretary shall be responsible for day-to-day Federal security screening; develop standards for the hiring and retention of security-screening personnel; train and test security-screening personnel; and be responsible for hiring and training personnel to provide screening.

other agencies' interpretations of the statutes they are charged with implementing. See, e.g., *Exxon Shipping Co.*, 312 NLRB 566, 567 (1993).[16]

In addition to looking to other agencies on statutory interpretation issues, the Board has previously looked to the view of other Federal agencies when deciding whether to assert jurisdiction. In *General Electric Co.*, 89 NLRB 726, 736 (1950), the Board looked to the Atomic Energy Commission when deciding whether to exercise jurisdiction over the employer's atomic energy plant, which was operated under contract with the Atomic Energy Commission. The Commission assented to collective bargaining among the employees involved in past cases and took no contrary position before the Board in that case.[17] Here, while the TSA did not specifically assent to the Board's exercise of jurisdiction, it did expressly state that organizing is a matter between private screeners and their employers, and expressed no concerns that would constrain the Board in determining whether to assert jurisdiction.

B. Further Interpretation of the ATSA

In addition to the TSA's interpretation of the annotation to Section 44935, our own analysis of the ATSA persuades us that the annotation does not extend to screeners employed by private entities and, as a result, neither does the Memorandum.[18] The annotation states: "[T]he Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service." The key words are "Federal service." If the private screeners are also in "Federal service," then arguably they could be deemed covered by the Memorandum. Contrary to the Employer and certain amici curiae, we do not believe that "Federal service" should be read to encompass all screener employees. "Federal service" is synonymous with "Federal employee" and consequently screeners who are employed by a private screening company are not members of the "Federal service."

The drafters of the ATSA were cognizant of the difference between Federally-employed screeners and privately-employed screeners. Consistent therewith, the language of the ATSA recognizes that there are screeners who are part of the "Federal service" and screeners who are not. Nothing in the ATSA suggests that the private-sector screeners should be treated as Federal-sector screeners.[19]

The language of Section 44935(i), the strike provision (quoted, supra at 2), reflects Congressional acknowledgement of the two separate groups of screeners under the ATSA—those in the "Federal service" and those who are privately employed—and that the limitation on the right to strike applies to both groups. If this were not the case, then there would have been no reason to specifically reference a "governmental entity" as included within the definition of "person" employing the screener.

Under the Federal Service Labor Management Relations Statute (FSLMRS), Federal employees do not have the right to strike.[20] On the other hand, the right to strike is recognized as a fundamental right under the Act. Congress was well aware of this disparity, so it indisputably denied the right to strike to both Federally- and privately-employed screeners, deeming it to be incom-

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We find that the Employer's reinterpretation of the Memorandum does not withstand scrutiny. While the Employer may be correct that the Under Secretary *could* have relied on Sec. 114 as the authority to issue his Memorandum, the fact remains that he did not. The text of the Memorandum is clear—the Under Secretary relied on the power vested in him by the annotation to Sec. 44935. According to the TSA, the annotation to Sec. 44935 does not apply to privately employed screeners and consequently neither does the Memorandum. We will not speculate about what other provisions, if any, the Under Secretary could have relied on.

[16] In *Exxon Shipping Co.*, 302 NLRB 290 (1991), the Board found that the employer violated Sec. 8(a)(1), (3), and (5) of the Act. In doing so, the Board construed 46 U.S.C. §10315, a statute dealing with the allotment of wages for coastwise shipping. The U.S. Court of Appeals for the Third Circuit remanded the case to the Board with instructions to solicit the Department of Transportation's views on the applicable shipping statutes. *Exxon Shipping Co. v. NLRB*, Docket Nos. 91-3230 and 91-3283 (3d Cir. 1991) (unpublished judgment). Pursuant to that direction, the Board queried the Department. The Board reconsidered its original decision in light of the court's remand, the Coast Guard's interpretation of the statutory provisions, and the parties' statements of position, and reversed its original decision and dismissed the complaint. The Board stated: "In doing so, we give substantial weight to the interpretation of the Coast Guard." *Exxon Shipping Co.*, 312 NLRB 566, 567 (1993). See also *Olaa Sugar Co.*, 118 NLRB 1442, 1444 (1957); *Imperial Garden Growers*, 91 NLRB 1034, 1037 (1953).

[17] See also *Reynolds Corp.*, 74 NLRB 1622, 1630 (1948); *Sac & Fox Industries*, 307 NLRB 241 (1992).

[18] *See Allis-Chalmers Mfg. Co.*, 52 NLRB 100, 102 (1943) ("There is nothing in the War Labor Disputes Act to indicate that Congress intended the Act to encroach in any way upon the exclusive authority which the National Labor Relations Act grants to the Board to investigate and determine in appropriate cases questions concerning the representation of employees.").

[19] Sec. 44901(a) states that "screening shall take place before boarding and shall be carried out by a *Federal Government* employee (as defined in section 2105 of title 5, United States Code), except as otherwise provided in [S]ection 44919 or 44920." Thus, Sec. 44901(a) contemplates that screening will be done by Federal employees as well as employees of private security firms, who carry out screening pursuant to Sec. 44919 or 44920. Additionally, private employees are clearly not Federal employees because they do not meet the definition of "employee" codified in Sec. 2105 of Title 5, United States Code. The language of Sec. 44901 appears to specifically remove privately-employed screeners from the boundaries of Federal Government service, and thereby removes them from the application of the annotation to Sec. 44935.

[20] See 5 U.S.C. § 7116(b)(7).

patible with national security interests. The reasonable inference is that Congress knew that, absent legislation, privately-employed screeners would have the right to strike. Phrased differently, Congress was aware that privately-employed screeners are covered by the Act.

Additionally, a fundamental principle of statutory construction is that statutes are to be read so as to render all of their provisions meaningful. *Mail Order Assn. of America v. Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993). If, however, the annotation to Section 44935 were read to apply to private screeners then a portion of Section 44919(f) (and Sec. 44920 (c)) would be rendered meaningless. The annotation to Section 44935 concludes with the sentence: "The Under Secretary shall establish levels of compensation and other benefits for individuals so employed." While the Under Secretary clearly has authority to establish the salary and benefits for Federally-employed screeners, he does not have authority to establish the salary and benefits for privately-employed screeners. Section 44919(f) provides that qualified private-screening companies must "provide compensation and other benefits to such individuals that are not less than the level of compensation and other benefits provided to such Federal Government personnel in accordance with this chapter." If the annotation to Section 44935 applied to private screeners, then the Under Secretary would have the authority to establish the salary and benefits for privately employed screeners, contradicting and rendering meaningless Section 44919(f).[21]

C. Legislative History

The legislative history of the annotation to Section 44935 also supports our analysis. Senator McCain added the annotation to Section 44935 as an amendment shortly after the bill's introduction. The amendment's purpose was "[t]o authorize the employment, suspension, and termination of airport passenger security screeners without regard to the provisions of title 5, United States Code, otherwise applicable to such employees." See 147 Cong. Rec. 10,520 (purpose read into the record by the assistant legislative clerk). Title 5 contains all of the Civil Service provisions governing *Federal* employees including the FSLMRS. The amendment was agreed to without objection and adopted. Id. The stated purpose and lack of objection strongly suggest that the Senate understood that the annotation provided the Under Secretary with exclusive authority over the terms and conditions of employment for Federal airport screeners.

Further, in arguing that the term "Federal service" in Section 44935 should be read to encompass all screener employees, the Employer cites to amici curiae Representative Mica and Former Majority Leader Armey's discussion of the ATSA conference report. H.R. Conf. Rep. No. 107-296 (2001).[22] Both Representative Mica and Former Majority Leader Armey quote the following sentence from the report: "The Conferees recognize that, in order to ensure that Federal screeners are able to provide the best security possible, the Secretary must be given wide latitude to determine the terms of employment of screeners." Id. at 64. They contend that by using the term "Federal screeners," the Conferees differentiated between the "pre-9/11" aviation security model, under which air carriers were responsible for screening passengers, and the "post-9/11" screening model, under which this function became the responsibility of the Federal Government.

Nevertheless, Representative Mica's and Former Majority Leader Armey's interpretation of the conference committee report is ultimately unhelpful in trying to interpret the words "Federal service" as used in ATSA. First, while committee reports can be helpful tools for interpreting statutes, they do not embody the law. *Abourezk v. Reagan*, 785 F.2d 1043, 1054 fn. 11 (D.C. Cir. 1986). Second, the conference report does not directly address the term "Federal service" as used in Section 44935. The Employer would have us equate "Federal screeners" with "Federal service." While it is permissible to use a committee report to interpret unclear language contained in the statute, the Employer's desired interpretation would go too far. In essence, we would have to accept amici curiae's interpretation of the words "Federal screeners" in the committee report and then use that interpretation to interpret the words "Federal service" in the statute. This "double interpretation" is almost entirely divorced from the text of the committee report and statute. We have been cautioned that we cannot treat the language in a committee report as a statutory provision and then use statements by individual representatives to "interpret" that language and give it the force of law. See *Electrical Workers Local 474 v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987). The Employer's proposed interpretation does essentially just that by treating the committee report words "Federal screeners" the same as the statutory words "Federal service" and then using

[21] *See Management Training Corp.*, 317 NLRB 1355, 1356 (1995) *citing Dynaelectron*, 286 NLRB 302 (1987) ("Consequently, as there was no restriction on the maximum amount of wages the employer could pay, the Board reasoned that the employer was free to compensate its employees at whatever level it wished, subject only to the minimums specified in the contract.").

[22] The conference committee report did not make any changes to or discuss any of the language in Sec. 44935.

the amici curiae's interpretation to give it the force of law.

III.

The Employer and certain amici curiae argue that even if the Under Secretary's Memorandum does not specifically preclude the Board from asserting jurisdiction, the Board should decline to assert jurisdiction in the interest of national security. The Board has been confronted with issues concerning national security and national defense since its early days. Our examination of the relevant precedent reveals that for over 60 years, in times of both war and peace, the Board has asserted jurisdiction over employers and employees that have been involved in national security and defense. We can find no case in which our protection of employees' Section 7 rights had an adverse impact on national security or defense. Our jurisprudence establishes that with regard to national security and defense, employee "[s]elf-organization for collective bargaining is not incompatible with efficient and faithful performance of duty." *Dravo Corp.*, 52 NLRB 322, 327 (1943).[23]

During World War II the Board exercised jurisdiction innumerable times in the name of national security and defense. For example, in *Chrysler Corp.*, 44 NLRB 881 (1942), the employer manufactured war material for the U.S. Government. The petitioner sought to organize the employer's plant-protection forces. Plant-protection employees guarded the employer's property against espionage, theft, trespass, and fire and accident hazards. They enforced safety and disciplinary regulations. They examined packages leaving and entering the plants. They investigated and reported to the military authorities occurrences which aroused their suspicion. The Board remarked that: "The present production of war materials at the Company's plants increases the importance of their work and their responsibilities." Id. 884–885. The War Department issued a directive, making plant-protection employees at plants producing war materials civilian auxiliaries of the military police. Under appropriate Army supervision, the employees were trained and equipped to meet the additional responsibility placed upon them. The employer contended that the Board should dismiss the case on the ground that the organization of plant-protection employees and their affiliation with the same union which represented production and maintenance employees, whose activities they watched and guarded, would materially lessen the efficiency of the former.[24] The Board found no merit in the employer's contention. The Board stated:

> We are mindful of the increased responsibilities placed upon plant-protection employees in wartime, but the practices and procedures of collective bargaining are flexible, and may make full allowance for such added responsibilities. . . . In any event, the remedy for inefficiency or willful disregard or neglect of duty on the part of the plant-protection employees lies implicitly in the power of the Company to discipline or discharge them and in the power of the military authority to take all necessary steps to protect the public interest. We find, therefore, no reason to deny the request of the Company's plant-protection employees to constitute a separate bargaining unit and to deny them, as such, the right to bargain collectively with their employer through a representative of their own choosing. Id. at 886.

In *Budd Wheel Co.*, 52 NLRB 666 (1943), the employer manufactured shells and truck wheels, hubs, drums, and brake parts for the U.S. Government. The union sought to represent the employer's plant protection employees. The employer advanced numerous reasons why the plant-protection employees should not be able to organize. The Board rejected all of the employer's arguments. First, the employer contended that the guards were auxiliaries to the militarized police. The Board responded: "We have held in numerous cases that this change in the status of guards, growing out of the war, does not deprive them of the rights of collective bargaining guaranteed to employees under the Act. In the instant case, the Company's peace-time control over its guards has not been altered materially." Id. at 669. Second, the employer contended that it was contrary to public policy, especially in time of war, to extend the protection of the Act to guards. The Board responded: "No evidence is offered by the Company in support of this proposition. The fact that the guards are now engaged in protecting property of the U.S. Government is not in itself any reason for denying the rights of collective bargaining to such employees." Id. at 670. Third, the employer contended that it would not effectuate the policies

[23] Our dissenting colleague remarks that in some of the cases cited below, the Board's jurisdiction was not at issue. While this may be true, the cases illuminate how the Board has traditionally dealt with issues surrounding national security and defense. Moreover, these cases involved industries and employees that were intimately connected to vital national interests, and history reflects that the application of the Act in those cases did not harm national security.

[24] We are aware, of course, that all of the World War II era cases arose prior to the enactment of Sec. 9(b)(3). Prior to Sec. 9(b)(3) the Board had consistently permitted militarized plant guards to be represented, albeit in a separate bargaining unit, by the same labor organizations which also represented the employer's production employees. See, e.g., *Phelps-Dodge Copper Products Corp.*, 41 NLRB 973 (1942); *Armour & Co.*, 63 NLRB 1200 (1945).

of the Act to require the company to bargain collectively with the guards or with the union as the representative of the guards. The Board responded:

> The declared policy of the Act is "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred." Among the obstructions set forth in the Act are "strikes and other forms of industrial strife or unrest" and "inequality of bargaining power." It can hardly be seriously contended that such obstructions result only from conflict between production employees and the employer. Nor do we believe that the war has eliminated all these obstructions; on the contrary, strife and unrest and inequality of bargaining power are likely to continue in the absence of collective bargaining, particularly in the face of self-imposed limitations on the right to strike and, in the case of militarized guards, the necessary restrictions imposed by the Government. Id.

Finally, the employer contended that it was inconsistent with the prosecution of the war effort to order it to bargain collectively with its guards. The Board responded: "In view of what has been said in answer to preceding contentions, this argument is unpersuasive. An efficient prosecution of the war effort demands the preservation of the right to collective bargaining, not its destruction." Id.

In 1945, the Board dealt directly with the issue of the application of the Act during wartime. In *Bethlehem Steel Co.*, 61 NLRB 892 (1945), the employer manufactured structural steel, most of which was ultimately used in the war effort. The union sought to represent all guards at the employer's Chicago plant. The employer contended that the unit of guards would not effectuate the purposes of the Act. The Board rejected the employer's contention. The Board stated:

> We are persuaded that the unit sought is appropriate and will fully effectuate the policies of the Act. In reaching this conclusion, we are not unmindful that this country is at war and the Company is engaged in war production, and we have fully considered the national welfare. That steady and unimpeded flow of commerce which the Act is designed to maintain by the encouragement of the orderly procedures of collective bargaining is doubly essential in time of war. It is in keeping with the policies of the Act and it is in the public interest to foster and protect collective bargaining by guards, thereby promoting a practice necessary to the amicable settlement of labor disputes and eliminating obstructions to commerce. Id. at 896.

In *Rohm & Haas Co.*, 60 NLRB 554 (1945), the Board made another observation about collective bargaining during wartime:

> During this war period, militarized plant-protection employees, to an even greater extent than other employees engaged in war production, have surrendered their traditional economic weapons, and submitted to novel restraints upon their freedom to act in furtherance of their interests as wage earners. Consequently, their exercise of the right to self-organization and collective bargaining, guaranteed by the Act to all employees as a means of eliminating and preventing obstructions to commerce, assumes particular importance to the national welfare, for the collective bargaining process is the only orderly and peaceful way in which such employees can adjust their employment problems. To close that way would be to create an intolerable threat to war production. Id. at 556–557.

In fact, the Board specifically ruled that the exigencies of World War II required an expansion, not erosion, of collective-bargaining rights as the best means for achieving stable labor relations and the free flow of commerce. In *Taylor Forge & Pipe Works*, 58 NLRB 1375, 1378–1379 (1944), the Board expanded the certification year of the incumbent union specifically because of "the exigencies of war-time labor relations."

After the War, the Supreme Court issued opinions in two cases that vindicated the Board's wartime jurisprudence. See *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947); *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947). The *Jones & Laughlin* Court observed that "in this nation, the statutory rights of citizens are not to be readily cut down on pleas of military necessity. . . ." 331 U.S. at 426. In *E.C. Atkins*, the Court agreed with the Board that there was no conflict between the unionization of plant guards on one hand and their loyalty and efficiency on the other. 331 U.S. at 404–405.

During the Korean War and the early years of the "Cold War," the Board continued to follow the same practice. In *General Electric Co.*, 85 NLRB 1316 (1949), the employer produced atomic energy for the sole use of the Government. The Board rejected the employer's contention that due to national security concerns, the plant patrolmen should not be allowed to engage in collective bargaining.

Similarly in 1954, the Board recognized the value of asserting jurisdiction over defense-related industries because the Act provides mechanisms for enhancing industrial stability and deterring labor strife. In *Maytag Aircraft Corp.*, 110 NLRB 594, 595 (1954), the Board reiterated that it is precisely because of the potential effect

upon the national interest that the Board should exercise jurisdiction over defense-related contracts.

In *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318, 320 (1958), the Board determined once and for all that it would best effectuate the policies of the Act "to assert jurisdiction over all enterprises, as to which the Board has statutory jurisdiction, whose operations exert a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdictional standards." In adopting this standard the Board noted its "special responsibility as a Federal agency to reduce the number of labor disputes which might have an adverse effect on the Nation's defense effort." Id.

Since that time, the Board has exercised jurisdiction over innumerable employers whose operations exert a substantial impact on national defense and security. See, e.g., *Aerospace Corp.*, 331 NLRB 561 (2000) (research and development for military space-related programs); *General Security Services Corp.*, 323 NLRB 540 (1997), enf. denied on other grounds 162 F.3d 437 (6th Cir. 1998) (security services at Federal courthouses); *Old Dominion Security*, 289 NLRB 81 (1988) (security services for U.S. Navy); *Mason & Hanger Co.*, 270 NLRB 383 (1984), enfd. 789 F.2d 1465 (10th Cir. 1986) (security services at Los Alamos National Laboratories); *McDonnell Douglas Corp.*, 240 NLRB 794 (1979) (manufacturer of fighter planes and various types of missiles); *Champlain Security Services*, 243 NLRB 755 (1979) (security services for the U.S. Coast Guard); *Beiser Aviation Corp.*, 135 NLRB 399 (1962) (pilot training and aircraft maintenance for military); *Plumbers Local 44 (MacDonald-Scott & Associates)*, 131 NLRB 787 (1961) (construct and install Titan missile facilities); *Texas-Zinc Minerals Corp.*, 126 NLRB 603 (1960) (operate uranium concentrate mill pursuant to a contract with the Atomic Energy Commission). This practice has continued after September 11, 2001. See, e.g., *Baywatch Security and Investigations, Inc.*, 337 NLRB No. 70 (2001) (not reported in Board volume) (security services to the U.S. Department of the Army's Longhorn Army Ammunition Plant).

As the foregoing precedent establishes, the Board has not asserted national security or defense as a reason to deny employees their Section 7 rights to organize and bargain collectively. Of course, we recognize the new challenges that living in a post-September 11 world present, and we recognize, as our dissenting colleague points out, that in none of the above-cited cases did the employees have duties indistinguishable from Federal employees who lacked collective-bargaining rights; however, we do not think that these facts fatally undermine the Board's reasoning and warrant a wholesale rejection of over 60 years worth of precedent.[25]

The Employer also argues that there should be no disparity between screeners in the Federal service and those in private employment. This contention merits two different responses. First, allowing private screeners to be represented for the purposes of collective bargaining will not create disparate security standards among the nation's airports. As confirmed in the record, the security standards for screening operations are entirely at the direction of the TSA and will remain so. The minimum employment standards, equipment used, and procedures and protocols followed are identical between the two groups. In 2004, as required by law, the TSA analyzed the pilot program to determine if the private screeners delivered the same level of security and customer service as Federal screeners. The TSA hired independent consultants to conduct a study, and it was determined that the private screeners were able to meet the same standards.

Second, it is undeniable that if private sector employees are allowed to organize and bargain collectively, there may well be disparities in the terms of employment between that group and TSA employees. Such disparities, however, are consistent with the design of the PP5 pilot program and the "opt-out" program. We recognize that by Federalizing airport security screening Congress intended to fundamentally change the way security screening was done across the nation. However, Congress itself initially did not agree how to best accomplish this goal. The Senate thought that security screening should be carried out by Federal employees and the House thought that screening should be carried out by deputized private-sector employees.[26] Pursuant to a subsequent compromise, the bulk of airport security screening was Federalized but the PP5 pilot program and the "opt-out" programs were created. These programs were created to allow Congress to compare the efficacy of Federal screening and private screening with the ultimate goal being to expand the "opt-out" program if it was successful.

Further, the Employer argues that security and safety concerns would not be fully provided for in a union setting. However, we do not view the assertion of jurisdiction as incompatible with the maintenance of national

[25] See *ITT Industries*, 341 NLRB 937, 941 (2004) ("We are mindful that our nation faces significant risks. We are equally mindful of our responsibility to protect the statutory rights of employees at such time, and at all times.").

[26] See Aviation Security Act, S. 1446, 107th Congress, Sec. 1080 and Secure Transportation for America Act of 2001, H.R. 3150, 107th Congress, Section 102.

security requirements.[27] Unionism and collective bargaining are capable of adjustments to accommodate the special functions of the security screeners, and the regulations set forth in the ATSA already limit the collective-bargaining rights of security screeners. Thus, the Employer's employees are forbidden from striking and the Employer and the Petitioner will not be able to bargain over many mandatory subjects that would normally be the subject of bargaining in an unregulated private industry. Additionally, other airport/airline personnel including pilots, flight attendants, airline mechanics, and others in the airline industry who have critical security responsibilities have the right to bargain collectively under the Railway Labor Act.[28] Consequently, any argument by the Employer about the potential detrimental effects of unionization is speculative. The Supreme Court's conclusion in *Jones and Laughlin* is just as applicable to this case:

> Union membership and collective bargaining are capable of being molded to fit the special responsibilities of deputized plant guards and we cannot assume, as a proposition of law, that they will not be so molded. If there is any danger that particular deputized guards may not faithfully perform their obligations to the public, the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agents. 331 U.S. at 430.

Finally, prudence cautions against crafting, as some amici curiae advocate, a broad and ill-defined national security exception to the Board's jurisdiction. Such an exception would threaten the general application of the Act to Government contractors, depriving many classifications of workers the statutory protection they have long been afforded. Ultimately, of course, it is within the province of Congress to restrict the jurisdiction of the Board with respect to certain classifications of employees in the interests of national security. We perceive no such Congressional limitation in the ATSA.

IV.

Relying on Admiral Loy's Memorandum, our dissenting colleague contends that the Government official entrusted with ultimate responsibility for airport security has determined that the security screening function that is performed by privately-employed screeners is incompatible with unionization and collective bargaining. He would defer to that determination. We disagree for two reasons.

First, by concentrating only on the function of the employees at issue, our colleague ignores the major difference between the two groups of employees: that is, one group is Federally employed and the other (much smaller) group is privately employed. While we recognize that all screeners perform the same function and are subject to the same employment standards under the ATSA, the privately employed employees have additional rights under the Act, including the right to organize and bargain collectively, by virtue of their private employment status and irrespective of their function. That is, as our colleague acknowledges, the Employer here is an employer within the meaning of Section 2(2) of the Act, and the employees here are employees within the meaning of Section 2(3) of the Act. Congress did not indicate in the ATSA that it wished to deprive private employees of any labor law rights—except the right to strike (which it withheld from all screeners).

It is these rights that are at issue in this dispute. Therefore, in order to determine whether to assert jurisdiction, we must look beyond function and examine how the employees at issue fit within our statutory scheme. When we do, it becomes apparent that the Employer's relationship to its employees is similar to the multitude of other relationships between Government contractors and their employees that are currently governed by the Act.

Second, as discussed more fully above, the ATSA does not give the Under Secretary the authority to divest privately employed screeners of their right to engage in collective bargaining with their respective employers—the Under Secretary only has that authority with regard to Federally-employed screeners. Thus, as our colleague acknowledges, despite the Under Secretary's determination regarding Federally-employed screeners, the TSA has taken an explicit position of neutrality when it comes to the rights of private screeners. The TSA has made no pronouncements seeking to eliminate private screeners from the protections of the Act. Instead, the TSA has specifically stated that organizing is a matter between screeners and private employers. Specifically presented with the opportunity to do so in this case, the TSA did not ask us to decline to assert jurisdiction in the interest of national security. Absent such a request, we will apply the Act to the Employer, as we do to other employers that fall within our jurisdiction.

Our colleague asserts that the TSA has appropriately restrained itself from telling the Board how to interpret

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[27] See Joseph Slater, *Homeland Security v. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 UPAJLEL 295, 329 (2004) ("Advocates of eliminating worker rights have echoed outdated, inaccurate stereotypes of unions as inherently inefficient without supporting evidence.").

[28] *Railway Labor Act*, 45 U.S.C. §§ 151-63, 181-88, 44 Stat. 577 (1926). The RLA covers private sector airlines and provides full collective-bargaining rights. 45 U.S.C. § 152 (2000).

and apply the Act and that the Board remains free to give effect to the Under Secretary's determination in the private sector, where the Board (not the TSA) has authority. However, we find that doing so would be a derogation of our statutory duty to administer and enforce the Act. As explained, Congress deliberately created a statutory regime that provides for some security screeners to be employed in the private sector. Further, since private-sector employees enjoy the right to bargain collectively under the Act, Congress presumably knew that private screeners would be entitled to the protections of the Act. If Congress wanted to exclude private screeners from the Act's coverage, it could, and presumably would, have done so.[29] Contrary to our colleague's contention, however, Congress has not acted in this sphere. Absent both a clear statement of Congressional intent and a clear statement from the TSA that would support our refusal to exercise jurisdiction, we will not create a nonstatutory, policy-based exemption for private screeners. We see no compelling reason for us to divest private screeners from the protections of the Act. Rather, the Employer's employees should be able to avail themselves of the rights afforded them under the Act. In sum, contrary to our colleague's view, we find that we should leave the policy decision to Congress, since the issue is essentially not one of Federal *labor* policy, but of national-security policy.

V.

The Employer and the amici curiae advance two primary reasons why we should decline to assert jurisdiction. The first reason is based on the ATSA and its legislative history and the second reason is grounded in policy considerations. As demonstrated above, neither of these reasons withstands scrutiny. Consequently, we affirm the Regional Director's decision for the reasons stated herein and remand this case to him for further appropriate action.

ORDER

The Regional Director's Decision and Direction of Election is affirmed. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Order.

Dated, Washington, D.C. June 28, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KIRSANOW, dissenting.

I agree with my colleagues that the Board is not statutorily barred from asserting jurisdiction over private employers of airport security screeners. As a matter of public policy, however, I would decline to assert jurisdiction over such employers in the interests of national security. I would defer to the finding of the Federal official entrusted with responsibility over airport security, which is that unionization and collective bargaining are incompatible with the critical national-security responsibilities of individuals carrying out the security-screening function.

Immediately after the terrorist attacks of September 11, 2001, Congress Federalized airport security by enacting the Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration (TSA). ATSA authorizes the head of the TSA, inter alia, to "fix the compensation, terms, and conditions of employment" of Federal airport security screeners. 49 U.S.C. § 44935 Note. Pursuant to that authority, Under Secretary of Transportation for Security James Loy issued the following memorandum:

> By virtue of the authority vested in the Under Secretary of Transportation for Security in Section 111(d) of the Aviation and Transportation Security Act, Pub. Law No. 107-71, 49 U.S.C. § 44935 Note 2001, I hereby determine that individuals carrying out the security screening function under section 44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization.

The Federal Labor Relations Authority upheld Under Secretary Loy's determination.[1]

[29] Congress could have vested the Under Secretary with authority over the "terms and conditions of employment" of private screeners and/or altered the parameters of the PP5 and "opt-out" program.

[1] U.S. Department of Homeland Security, Border & Transportation Security Directorate, Transportation Security Administration, 59 FLRA 423 (2003).

Thus, the Government official entrusted with ultimate responsibility for airport security has determined that unionization and collective bargaining are incompatible with the "critical national security responsibilities" of "individuals carrying out the security screening function under [49 U.S.C.] section 44901." Individuals carrying out the security-screening function under Section 44901 are Federal employees; ATSA also provides for privately-employed security screeners under 49 U.S.C. Sections 44919 and 44920. It is undisputed, however, and my colleagues acknowledge, that privately employed screeners and Federally-employed screeners have identical duties. Both sets of employees "carry[ ] out the security screening function." There is no difference whatsoever between the security-screening function "under section 44901" and the security-screening function under Sections 44919 and 44920. And it is the carrying out of that *function* that the Under Secretary has determined to be incompatible with unionization and collective bargaining. I would defer to that determination.

I recognize that, when directly asked whether privately-employed security screeners may organize, the TSA has taken a position of neutrality. This is understandable. The organizational rights of privately-employed security screeners are governed by the Act, which is administered by this agency, not by the TSA. Just as the Board would decline to instruct the TSA in the proper interpretation and application of the ATSA, so also the TSA has appropriately restrained itself from telling the Board how to interpret and apply the Act. Nonetheless, Under Secretary Loy's determination is that unionization and collective bargaining are incompatible with the security-screening *function*, which is performed by privately-employed screeners in precisely the same way as by Federally-employed screeners. That determination speaks for itself, notwithstanding the TSA's official neutrality on an issue outside its jurisdiction.

My colleagues cite numerous cases, dating from the World War II era to the present, that they say stand for the proposition that the Board has consistently asserted jurisdiction over employers involved in national security and defense. In many of those cases, however, the Board's jurisdiction was not even at issue.[2] In those cases cited by the majority in which a jurisdictional issue is presented, none presents the unique issue before the Board in this case: whether to assert jurisdiction notwithstanding a determination by the responsible Federal-agency head that the critical national-security function performed by the affected employees precludes unionization and collective bargaining.[3]

My colleagues say that creating a national-security exception will open the floodgates and potentially "threaten the general application of the Act to Government contractors." I am not advocating a national-security exception potentially applicable to Government contractors generally. My position is based on two circumstances never before presented to the Board and unlikely ever to be presented again: Federal and private employees performing indistinguishable functions deemed critical to national security, and a finding by the responsible agency head that these functions are incompatible with collective bargaining. Declining jurisdiction under these unique circumstances would not set the Board on a slippery slope.

The majority says that I ignore the fact that the security screeners in this case are privately employed and therefore possessed of rights under the Act. They observe that, because Congress prohibited all screeners (Federal and private) from striking, it can be inferred that Congress knew that privately-employed screeners would otherwise have that right as employees covered by the Act. I do not ignore those facts. I acknowledge that there is no statutory bar to asserting jurisdiction here. I would decline to do so, however, because I would defer to the Under Secretary's determination that the screening function and unionization are incompatible. My col-

[2] See *Chrysler Corp.*, 44 NLRB 881 (1942) (presenting appropriate bargaining unit issue); *Dravo Corp.*, 52 NLRB 322 (1943) (same); *Taylor Forge & Pipe Works*, 58 NLRB 1375 (1944) (presenting issue of whether extension of certification year warranted due to delay resulting from submission of dispute to War Labor Board); *Rohm & Haas Co.*, 60 NLRB 554 (1945) (presenting appropriate bargaining unit issue); *Bethlehem Steel Co.*, 61 NLRB 892 (1945) (same); *General Electric Co.*, 85 NLRB 1316 (1949) (same); *McDonnell Douglas Corp.*, 240 NLRB 794 (1979) (jurisdiction admitted); *Mason & Hanger Co.*, 270 NLRB 383 (1984) (jurisdiction admitted), enfd. 789 F.2d 1465 (10th Cir. 1986); *General Security Services Corp.*, 323 NLRB 540 (1997) (jurisdiction admitted), enf. denied 162 F.3d 437 (6th Cir. 1998); *Aerospace Corp.*, 331 NLRB 561 (2000) (presenting appropriate bargaining unit issue).

[3] See *Budd Wheel Co.*, 52 NLRB 666 (1943) (rejecting claim of lack of jurisdiction as contradicted by respondent's prior stipulation); *Maytag Aircraft Corp.*, 110 NLRB 594 (1954) (presenting issue of quantum of commerce necessary to meet jurisdictional threshold); *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318 (1958) (same); *Texas-Zinc Minerals Corp.*, 126 NLRB 603 (1960) (presenting issue of whether Board has jurisdiction over mill located on tribal lands); *Plumbers & Steamfitters Local 598 (Kennewick)*, 131 NLRB 787 (1961) (routinely applying *Ready Mixed Concrete* standard); *Beiser Aviation Corp.*, 135 NLRB 399 (1962) (same); *Champlain Security Services*, 243 NLRB 755 (1979) (finding that private employer of guards employed at Coast Guard installation does not share Coast Guard's Governmental-entity exemption under the Act; no claim advanced that privately-employed guards perform national security function incompatible with exercise of Sec. 7 rights); *Old Dominion Security*, 289 NLRB 81 (1988) (finding that private employer of guards at Navy installation does not share Navy's Governmental-entity exemption and is not joint employer with Navy; no claim advanced that privately employed guards perform national-security function incompatible with exercise of Sec. 7 rights).

leagues criticize me for concentrating on the screening function. They say we must "look beyond function." In my view, the Under Secretary's determination precludes looking beyond function. This is not a situation in which national security and Section 7 rights may be harmonized and reconciled. A contrary determination has been made. Thus, although I am deeply mindful of employee rights, in this highly unusual and perhaps even unique case I cannot accord them primacy. National security is the trump card, and it has been played; the Board should fold its hand.

Additionally, unlike my colleagues, I would not wait to do so until Congress explicitly removes privately employed screeners from the Act's coverage. Congress has acted. It vested broad authority over airport security screening in the Under Secretary. Acting under that authority, the Under Secretary has found collective bargaining and the screening function incompatible. That is sufficient congressional warrant for the Board to decline jurisdiction here.

In sum, it has been authoritatively determined that national security precludes extending organizational rights to Federally-employed airport security screeners. Such a determination is outside the expertise of the Board. Privately-employed screeners perform exactly the same security function as their Federal counterparts. Where the TSA has closed the front door, the Board should not open the back door. The Section 7 rights of employees are vitally important; the imperatives of national security are of paramount importance. I would decline jurisdiction.

Dated, Washington, D.C. June 28, 2006

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Peter N. Kirsanow, Member

NATIONAL LABOR RELATIONS BOARD